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Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL T. PODGURSKI,
Petitioner Prose

vs.

SUFFOLK COUNTY, SUFFOLK COUNTY DEPT. OF LAW, PATRICK G. HALPIN, RICHARD FINN, JOHN TURNER, GEORGE KEIGH, HAROLD TRANCHON, JR., RICHARD H. O'BRIEN, HAROLD S. SCHWARTZ, NASSAU COUNTY GIRL SCOUTS INC., TOWN OF BROOKHAVEN DEPT. OF LAW, JOHN/JANE DOE 1-99
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Michael T. Podgurski
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QUESTION(S) PRESENTED

Denial of the 7th amendment right to a jury trial for federal jurisdiction civil rights violations. Is this case a question of legal condemnation proceedings, or the subject of regulated governmental; takings; or is it in fact a use of professional cunning by various governmental entities collaborating with state licensed and/or regulated experts in order to circumvent the lawful and appropriate means of acquiring property or rights to a citizen individual's land in violation of

42 U.S.C. 1983
42 U.S.C. 1985
42 U.S.C. 1986

5th Amendment
14th Amendment
7th Amendment
9th Amendment

Should the judgment of the District Court dismissing the case upon the grounds that the federal courts lacked the subject matter jurisdiction to hear the dispute be affirmed.

Should the district courts decision granting dismissal of the complaint be reversed and trial be ordered or granted in the federal court embracing all of the defendants, conforming to constitutional guarantees of right to trial by jury.

Does the United States Code 42 Section 1983; Section 1985; and Section 1986 embrace all the respondents in this alleged conspiracy to deprive appellant of his property and rights guaranteed under the U.S. Constitution when they have an actual or implied fiduciary responsibility for securing the appellants rights.

Summary judgment vs. 7th amendment to the United States Constitution (right to jury trial).

States/(municipal subdivisions) have powers they do not have rights (therefore states cannot act as a private person would and thus the County of Suffolk as a municipal subdivision of the State of N.Y. has abused its power merely by asserting that power. As a right equal to the rights of its citizen residents to be protected by the United States Constitution.

Federal question case under Article III of the United States Constitution which extends the judicial power to "cases arising under this constitution, the Laws of the United States and Treaties", since 1875 the statute (now Sec. 1331) has given the district courts jurisdiction of "civil actions" that arise, under the constitution, laws of treaties of the United States.

Does the granting of summary judgment in this case (with many questions to be answered) violate the seventh amendment to the United States Constitution, ie. demand for jury trial that has been denied.

Since the issue of the confiscated/ownership of the road in question in this case was the subject and determination of fact by a jury trial during the early part of the 1870's, that went as far as the New York State Court of Appeals; should it be embraced by the United States Constitution Amendment Seven and should those findings of fact still stand and prevail.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 10

REASONS FOR GRANTING THE WRIT 20

CONCLUSION 22

INDEX TO APPENDICES

APPENDIX A
Copy of United States Court of Appeals Mandate Denying Preliminary Injunction and Dismissing Complaint

APPENDIX B
Judgment dated April 24, 1995 with attached memorandum and order from District Court E.D.N.Y.

APPENDIX C
District Court Order dismissing complaint against defendants including First American Title Co. and Town of Brookhaven etc. for failure to state a claim dated May 1, 1992

APPENDIX D
Court of Appeals denial of a timely filed petition for rehearing issued/dated Sept. 7, 1995

APPENDIX E
Amendments 5th, 7th, 9th, 14th to the United States Constitution

APPENDIX F
Various summary judgment decisions that would pertain to the case before this court

APPENDIX G 42 United States Code
Section 1983
Section 1985
Section 1986

TABLE OF AUTHORITIES

CASES: Page

Bacon v. Rutland R.R., 232 U.S. 134 (1914) 14

Barry v. Bardi, 443 U.S. 55 (1979) 15

Damico v. California, 389 U.S. 416 15

DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell U.S. Court of Appeals 3rd Circuit No. 93-5301 May 1, 1995.18

Dioguardi v. During, U.S. Court of Appeals 2nd Circuit 139 F. 2d 774 15

Esmail v. Macrane No. 94-3285 April 19, 1995 U.S. Court of Appeals 7th Circuit 17

Gibson V. Berryhill, 411 U.S. 564 (1973) . .15

Oklahoma Natural Gas Co. v. Russell 261 U.S. 290 (1923) 14

Wilwording v. Town of Southhold 48 F. 3d 674

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 20

Summary Judgment Decisions: Appendix
U.S. Dist Col. 1962 . . . . . F

U.S. Dist Col. 1986 . . . . . F

Appendix

U.S. Dist Col. 1986 . . . . . F

U.S. Dist Col. 1986 . . . . . F

U.S. Dist Col. 1986 . . . . . F

U.S. Dist Col. 1986 . . . . . F

U.S. Dist Col. 1986 . . . . . F

U.S. Dist Col. 1990 . . . . . F

U.S. Minn 1992 . . . . . F

U.S. N.Y. 1960 . . . . . F

U.S. Dist Col. 1962 . . . . . F

U.S. La. 1944 . . . . . F

U.S. Dist Col. 1949 . . . . . F

U.S. Okla. 1963 . . . . . F

U.S. N.Y. 1968 . . . . . F

Statutes

Appendix

42 U.S.C. 1983 . . . . . G

42 U.S.C. 1985 . . . . . G

42 U.S.C. 1986 . . . . . G

Constitutional Amendments Appendix E

5th Amendment . . . . . E
7th Amendment . . . . . E
9th Amendment . . . . . E
14th Amendment . . . . . .E

Federal Question Cases Page #

Federal questions become the jurisdiction of federal courts. By virtue of the U.S. Constitution's Article III 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals at Appendix A and D to the petition and is unreported

The opinion of the United States District Court appears at Appendix B Page 2 and 3 of to the petition and is reported as:
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 17, 1995.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Sept. 6, 1995 and a copy of the order denying rehearing appears at Appendix D.

This courts jurisdiction is invoked under title 28, U.S.C. Sec. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Page

Preliminary Statement 3

Excerpts from Fourth Congress of United States Sess. I Ch. 29 1796 Pg. 465 Vol. I-59 . .4

Conclusion to Excerpts of Fourth Congress . 5

The Congressional Land Ordinance of 1785 . .5

Federal Question Case 6

Admiralty Question (Navigable Waters) . . . 6

Conclusion to Admiralty or Navigable Waters 7

Ninth Amendment to U.S. Constitution 8

Violation of Equal Protection Under The Law 8

The Supremacy Clause 8

Opposition to Motion for Summary Judgment . 9

Summary Judgment 9

Conclusion to Summary Judgment Opposition . 9

PRELIMINARY STATEMENT

The issue that is before this court is not a case of takings through a condemnation proceedings as relied upon in Appendix B pg. 2 & 3 of the district courts order and memorandum of law. As well as it is not only a boundary dispute.

It is in fact, a deliberate defacto condemnation; without due process, or compensation, (outright land grab) violating the 5th & 14th & 9th amendments to the constitution; by means of a wrongful or tampered with Deed - Thereby not conveying to Suffolk County exactly what the Nassau County Girl Scouts did have title to. But yet conveying what this appellant has right and title to.

Suffolk County cannot exercise its rights as any ordinary citizen would; since it is an arm or subdivision of the state subject to the rules set forth in the United States Constitution and the amendments thereof.

Suffolk County by its representatives cannot exercise its rights as private property owners over property that it does not own (whether by mistake or fraud) and the Girl Scouts of Nassau Inc. Co. could not convey property they did not own through a wrongful or fraudulent deed.

The actions of the Girl Scouts of Nassau County, Inc. conveying a wrongful and/or fraudulent deed, to the County of Suffolk was brought to the attention of Suffolk County officials and others.

The failure or negligence of Suffolk County to examine the deed and survey for error or fraud in an expeditious manner show total disregard, disdain, arrogance, belligerence, etc. toward the civil rights violations complained of by this appellant. That is in addition to the wayward handling of the guarantees granted to this plaintiff by the United States Constitution.

Especially when the wrongs are so abundant and blatant, and pleas for redress go ignored.

Furthermore, the complaints by the plaintiff to assert his rights were met; by the several

county officials with "matter of fact" insensitivity, plus outright "poo-pooing" and worst of all; threats of arrest by certain Suffolk County officials. If the plaintiff were to insist on utilizing the "Ancient and Historical Road" and other property rights.

A road that runs with the plaintiff's land as an appurtenance and as a matter of law.

The claim of Good Faith by Suffolk County throughout the various stages of this litigation (prior to present) are without foundation.

THE GRANTING OF THE SOIL

THE FOLLOWING IS TAKEN FROM:

Fourth Congress. Sess. I Ch. 29 1796 Page 465 Vol. I-59 Sec. 2 "Be it further enacted, ...

1. "The titles to land, depends entirely on the laws of the nation in which they lie. Ibid"... Lessee of Johnson et al. v. McIntosh, 8 Wheat.543; 5 Cond. Rep. 515.

2. ... "By treaty between Great Britain and the United States which concluded the Revolution, the powers of government and right of the soil, which had been previously in Great Britain, passed definitely to the United States" Ibid...

3. ... "It is a principal of Universal Law, that if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to any government what ever, the country becomes the property of the discoverers, so far as they can use it. Ibid ...

4. ... A state has a perfect right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, descent devise or alienation. But Congress are invested by the constitution with the power of disposing of the public land and making needful rules and regulations concerning it. Ibid ...

5. "Whenever the question in any court state or federal, is whether the title to property

which had belonged to the United States, has passed, that question must be resolved by the laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed, and was vested according to the Laws of the United States. Ibid.

6. Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation, of the government, in reference to the public lands, declares the patent to be superior and conclusive evidence of legal title. Until it issues, the fee in government, which by the patent passes to the grantee, and he is entitled to recover the possession by ejectment. Bagnell v. Broderick, 13 Peters, 436.

CONCLUSION

The present dispute of confiscated lands, tenements and hereditaments is in fact a federal question to be resolved in the federal courts in that the failure of the subject parcels; the granting of the soil has not been in compliance with the laws of the United States thus creating a federal question to be resolved in the federal courts.

The Division of the Subject Land of The adversaries in this case has not been surveyed or divided according to the rectangular survey adopted as a feature of an ordinance in the Congress, adopted April 26, 1785 and passed on the 20 of May 1785 and made part of the laws of the United States.

THE CONGRESSIONALLY ENACTED LAND ORDINANCE OF 1785

The "Land Ordinance of 1785" in part provides for the survey of all public land according to certain meridians being designated as primary

meridians, run according to the true meridian and a north-south row of townships parallel to these meridians is called a range. Such rows are numbered running east & west from the primary meridians. A township is divided into thirty-six sections, each a mile square.

The surveying beginning from the north eastern corner and proceeding west then east along the second row, then west along the third row, and so forth.

Plaintiff desires that the laws of the United States be invoked with respect to this controversy the least of which is the above cited land ordinance of 1785.

And as an alternative and/or additional Federal Jurisdiction this plaintiff asserts following the federal question jurisdiction.

FEDERAL QUESTION CASES

Article III of the United States Constitution extends the judicial power to "Cases arising under this constitution, the laws of the United States, and Treaties"; Since 1875 the statute (now Sec. 1331) has given the district courts jurisdiction, of "Civil Actions" that arise under the constitution, laws, or treaties of the United States.

And as an alternative and/or additional federal jurisdiction this plaintiff invokes or asserts admiralty jurisdiction.

ADMIRALTY QUESTION - NAVIGABLE WATERS

Admiralty jurisdiction has been conferred on the federal courts ever since 1789 the present statute is Sec. 1333.

The most litigated issue of admiralty jurisdiction through the nineteenth century concerned the extension of admiralty. Jurisdiction to waters other than the high seas. When the issue was first presented the supreme court held in Thomas Jefferson (1825) that only tide waters were included. Today it is usually said that the

only waters excluded from admiralty are those wholly within a single state which never had a navigable outlet to another state.

"In tort cases the basic rule has been that jurisdiction exists only if the tort occurred on navigable waters, implemented by reference to the principle, drawn from the choice-of-law cases, that the tort occurs not where the wrongful act is done but where the injury is suffered (The Plymouth (U.S. 1866). 70 U.S. (3 Wall.) 20 (1866), 119.

... The shore line continues to cause arbitrary distinctions. The sixth circuit held a suit on behalf of a man who had tripped on a pier and fallen into the water was not maritime, because he had received the initial impact of the negligence when he tripped on the pier (land) (Wiper v. Great Lakes Engineering Works 340 F.2d 727 (6th Cir. 1965), 120.

Yet, when the victim had dived from a pier into shallow water the same court held the tort had occurred on navigable waters, since the first impact of negligence took place when he hit the water (Chapman 1967). Chapman v. Grosse Point Farms, 385 F.2d 962 (6th Cir. 1967, 120).

Admiralty jurisdiction traditionally did not include the power to give equitable relief such as specific performance or injunctions. Yet, congressional grants of equitable power have been upheld, such as the Ship Mortgage Act, and the Supreme Court in (Swift & Co. v. Compania 339 U.S. 684 1950) upheld admiralty power to give equitable relief that was ancillary to a claim properly brought in admiralty the recent procedural merger of law and admiralty should help to break down this silly limitation still further.

The most important limit on state-court jurisdiction is that the in rem proceedings may be brought only in federal courts".

CONCLUSION ON ADMIRALTY (NAVIGABLE WATERS)

Since some of land and the beginning point of the correct boundaries lies in and under the

tide waters of the Long Island Sound, which in turn is an extension or arm of the Atlantic Ocean thus part & parcel to the high seas and that the said beginning point was negligently and or fraudulently avoided. Federal admiralty jurisdiction is asserted as an alternative to other claimed jurisdictional arenas.

And as a further or alternative and/or additional federal jurisdiction this plaintiff invokes or asserts the 9th amendment to the United States Constitution.

9TH AMENDMENT TO U.S. CONSTITUTION

And the ninth amendment, which states that the enumeration of certain rights in the constitution does not mean that any rights not listed are there by denied to the people, has been held to protect certain aspects of privacy.

The right to be let alone, to be free of unwelcome intrusions or unwarranted. The Right of Privacy protects individuals from interference in private affairs or property.

VIOLATION OF THE EQUAL PROTECTION UNDER THE LAW

"No state shall deny to any person within its jurisdiction the equal protection of the laws".

And as an additional or further federal jurisdiction this plaintiff asserts the Supremacy clause.

SUPREMACY CLAUSE

The Supremacy Clause named for Article VI, section 2, of the United States Constitution which establishes the constitution, and federal laws, and treaties" ... made under the authority of the United States [as] the Supreme Law of the Land. But the Supremacy Clause directs that in any case of true conflict between Federal and State policy the latter (state) must yield.

OPPOSITION TO SUMMARY JUDGMENT

Further opposition to summary judgment for a removal to state court based on the previous request for motion removal to state court denied by Judge Sterling Johnson March 6, 1992 - at Brooklyn Federal Court.

If summary judgment is granted and this case is removed to the state court it is very likely that the federal jurisdiction question will be asserted once again - even if this court finds in favor of granting defendants motion because federal jurisdiction (in this case) is still in the court of last resort. The United States Supreme Court.

SUMMARY JUDGMENT

Summary judgment is a final decision in a case that does not require a lengthy presentation of evidence. It is considered an extreme remedy and should be granted only when it is clear that there is no material (important) issue of fact it completely avoids the necessity of a jury trial because the issues are clear as a matter of law.

Plaintiff in this case raises many objections, oppositions, and many important facts and questions still remain to be answered in this case. Such as where does the "Road in Question Really Lie" and where is the actual boundary line and which boundary line is the valid one. And which rock is the division line between the disputed properties and who actually owns the private road in question?

CONCLUSION

Plaintiff requests that respondent's motion for summary judgment pursuant to F.R.C.P. 12 (b) (1) and F.R.C.P. 56 (upon the grounds that the court lacks subject matter jurisdiction) be reviewed and denied on the basis of all or any of the several aforementioned federal jurisdictions discussed; in addition to the original constitu-

tional and civil rights complaint and claim for relief, with demand for jury trial. And as for further or alternative grounds, plaintiff seeks a redress of his civil rights being violated through the verdict of a jury trial at the district court. Appellant states that the defendant's judgment for an order dismissing the complaint is merely a redundant rehash of the same motion that was brought before United States Judge Sterling Johnson Jr. on March 6, 1992; which was not entertained at that time.

Therefore plaintiff respectfully requests that defendants summary judgment be denied in its entirety.

STATEMENT OF THE CASE

This plaintiff appellant prose, Michael T. Podgurski, seeks to invoke an appeal and/or petition for writ of certiorari as permitted by law in the district court case CV91-4162 appealed to the second circuit 95-7419 which was filed in the District Court E.D.N.Y. on or about October 25, 1991 charging a number of defendants of acting in a conspiracy of fraud and collusion in order to violate this appellants civil rights guaranteed by the 5th, 14th, 7th, and 9th amendments to the United States Constitution. Appellants vehicle for redress was invoked by asserting 42 United States Code Section 1983, which eventually was ended when a motion for summary judgment was granted, on or about April 24, 1995, dismissing the complaint without benefit of a trial.

This petition seeks a review of the entire case, the late submitting of defendants responses as indicated on the docket sheet, and particularly a review of an order signed by the Honorable, Sterling Johnson Jr., United States District Court Judge on May 1, 1992 stating:"For the

> reasons stated in the record for oral argument on March 6, 1992, the motions by George Keigh d/b/a Louis Mcclean Associates, Harold Trancheon, Richard

O'Brien, Harold S. Schwartz, First American Title Insurance Co., Nassau County Girl Scouts, Inc. and the Town of Brookhaven to dismiss the complaint against them for failure to state a claim is hereby granted."

The order virtually had the effect of releasing those defendants from any liability, responsibility or even a trial in the case comprised in part of charges of conspiracy to deprive and withhold from this appellant, his constitutionally guaranteed rights to private property and private property rights.

But upon information and belief, this appellant recalls that the defendants were dismissed without prejudice by Judge Johnson.

This appellant now seeks to reactivate them as defendants as part of the writ, and remand them to the district court for the completion of trial. (Copy of the order is annexed hereto and mark Appendix C).

This petition also seeks review of a particular memorandum and order and a final judgment in the same case by a separate and different reassigned Judge; The Honorable United States District Judge David G. Trager.

The order and memorandum signed and dated March 31, 1995; and the final judgment signed and dated April 24, 1995, (Copies of which are annexed hereto and marked Appendix B).

This order and memorandum virtually eliminates the case against the remaining defendants (Whom are Officers/employees and/or municipal subdivisions of the State of New York) for the violations of the civil rights of this appellant.

The order and memorandum waters down the disastrous effects resulting from the callous disregard perpetrated by the remaining defendants (Suffolk County and Its Officers/Employees) and misses the point or target of the insidious confiscation of real property rights, in part, by means of fraud and doctored up paperwork including deeds, surveys, etc. followed by intimidation of threats of police force intervention if the

appellant exercises his lawful private property rights.

These acts by themselves constitute governmental oppression; yet the County of Suffolk, its agents, associates, agents, employees' arrogance with regard to the recorded truth in the subject matter is demeaning, arbitrary, capricious, unconscionable, wrongful and above all; illegal.

No matter how small or large, this "land larceny" by a municipal subdivision of State Of New York Government must be dealt with in a very serious manner.

The subject memorandum and order cites Williamson County regional planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); (In taking claim, property owner must first seek redress through state remedies).

The case above cited does not conform to the subject matter, nor does it apply to the issues at hand. The cited case is not relative to the action being appealed. The above cited case deals with the subject of legal takings through the process of regulatory means, (it does not deal with takings through forceful and fraudulent and governmental oppressive means).

The case being appealed before this court is <u>not</u> even a case of governments' rightful and legal power and use of the eminent domain doctrine for condemnation (apparently bypassed for unknown reasons).

What is being appealed before this Court is a case of a "Ruthless Land Grab"; established through a back door conspiracy agenda, in order to avoid the required legal steps; and by any means possible including tacit and/or open agreement with others; by a municipal subdivision of the state that holds the awesome power and the ability to force or compel the professional holders of state issued licenses and others to gang up and callously trample upon the rights of innocent and weak resident citizens.

And one final remark on the subject of the memorandum and order; to make a minor correction, the appellants property is <u>not</u> oceanfront land as

stated in the subject order; it is Long Island Sound Front property where appellants home sits some 70 to 80 feet above sea level and the illegally confiscated property is a valley, ravine or swale which enables the its owner to access the beach by vehicle; the beach is inaccessible by vehicle at any other point due to the severe cliffs and steep overgrown inclines.

As far as the appellants opposition to the final judgment; not much more need be said than that this case was summarily dismissed at the District Court on April 24, 1995 <u>without just cause</u> and bing arbitrary.

As far as the issue of seeking redress through state remedies in a takings claim; I argue that it may rightfully apply to a justified or legally processed condemnation or a valid concept of a regulatory taking but the issue of a "Ruthless Land Grab" belongs in the Federal Court of Last resort either as a civil matter or more likely under the RICO process (Rackets Influenced and Corrupt Organizations) statutes. Summary judgment must not be allowed to take the place of the constitutional/common law right to a jury trial as guaranteed by the 7th amendment to the U.S. Constitution.

Further legal argument against seeking state judicial remedies now quoted here: taken from Wests' series entitled Federal Jurisdiction by David P. Currie, Feb. 1982 pages 197-198 as follows:

<u>"EXHAUSTION OF STATE REMEDIES"</u>

> "It is a familiar law that a federal court will generally refuse to review the action of a federal administrative agency before administrative remedies have been exhausted. At one time the Supreme Court said the exhaustion doctrine was of "especial force", because of the dictates of federalism, when the defendant was a state rather than a federal officer (Slattery, Natural Gas Pipeline Co. v. 302 U.S. 300 (1937). Exhaustion serves

to avoid piecemeal interruption of administrative processes, to avoid unnecessary judicial effort, and to secure the view of agency experts on questions within their competence. Its legal support lies in negative implication from the common statutory provisions for review of "final" federal administrative action - an argument unavailable when state agencies are involved; in extreme cases, in the constitutional requirement of a ripe controversy; and in such equitable doctrines as irreparable harm, public consequences, and adequacy of legal (administrative) remedies. Thus when delaying judicial intervention would subject the litigant to serious irreparable harm (beyond the mere cost of litigating before the agency) exhaustion was not required (Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923). But exhaustion merely delayed and did not foreclose a federal judicial remedy; if the agency failed to give satisfaction, the plaintiff could return to federal court. In contrast, exhaustion of state judicial remedies was never required. (Bacon v. Rutland R.R., 232 U.S. 134 (1914), for that would have precluded federal trial-court jurisdiction altogether by virtue of res judicata.

In recent years the Supreme Court has frequently refused to require exhaustion of state administrative remedies in actions under the civil-rights provisions of 42 U.S.C.A. Sec. 1983. While most of the actual decisions can be explained on the ground that the state remedy was futile or otherwise inadequate (Eisen v. Eastman, 421 F. 2d 560) (2d Cir. 1969), the opinions have often stated an

apparently absolute rule against requiring exhaustion in section 1983 cases (e.g., Damico v. California 389 U.S. 416 (1967; Wilwording v. Swenson, 404 U.S. 249 (1971)). Commentators have found support for such a rule in the strong policy of section 1983 to provide a federal forum, perceiving no inconsistency in forbidding exhaustion while allowing abstention, although the latter has a more adverse effect on the right to a federal forum through the operation of res judicata. More recently, in (Gibson v Berryhill, 411 U.S. 564 (1973; and in Barry v. Bardi 443 U.S. 55 (1979)), the Supreme Court has apparently left open whether the no-exhaustion rule is absolute.

Now for appellants' argument against both the Honorable Judge Johnson's order dated May 1 1992, dismissing some of the defendants without prejudice and also the judgment; and memorandum and order of the Honorable Judge David G. Trager; granting a motion for summary judgment dismissing the complaint in favor of the remaining defendants. This plaintiff appellant cites the following:

DIOGUARDI v. DURING
UNITED STATES COURT of APPEALS SECOND CIRCUIT (1944) 139 f. 2d 774

"Clark Circuit Judge ... On defendant's motion for dismissal on the same ground as before, the court made a final judgment dismissing the complaint, and plaintiff now comes to us with increased volubility, if not clarity.

It would seem however, that he has stated enough to withstand a mere formal motion, directed only to the face of the complaint, and that here is another instance of judicial haste

which in the long run makes waste. Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c; and the motion for dismissal under Rule 12b is for failure to state "a claim upon which relief can be granted." The District Court does not say why it concluded that the complaints showed no claim upon which relief could be granted; and the United States Attorney's brief before us does not help us, for it is limited to the prognostication - unfortunately ill founded so far as we are concerned - that "the most cursory examination" of them will show the correctness of the District Court's action.

We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced - and, indeed, required by 19 U.S.C.A. Sec. 1491, above cited, and the Treasury Regulations promulgated under it, formerly 19 CFR 18.70-18.12, now 19 CFR 20.5, 8 Fed. Reg. 8407, 8408, June 19, 1943. As to the latter claim, it may be that the collector's only error is a failure to collect an additional ten dollars from the Springdale Distilling Company; but giving the plaintiff the benefit of reasonable intendments in his allegations (as we must

on this motion), the claim appears to be in effect that he was actually the first bidder at the price for which they were sold, and hence was entitled to the merchandise. Of course, defendant did not need to move on the complaint alone; he could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting ...

... Judgment is reversed and the action is remanded for further proceedings now inconsistent with this opinion."

Excerpts from:

U.S. Court of Appeals 7th circuit. Esmail v. Macrane, No. 94-3285. April 19, 1995.

Where a mayor revoked a liquor license because he was "out to get" the liquor store owner, he can be sued under 42 U.S.C. sec. 1983 for violating the equal protection clause says the seventh circuit in reversing a dismissal of the case.

"This is apparently the first court in the country to hold this way. However earlier this year the second circuit suggested in dicta that such a cause of action might be viable in a case in which a real estate developer was denied a building permit. (Zahra v. Town of Southhold. 48F.3d 674.)

The seventh circuit opinion was written by Chief Judge Richard Posner the ruling could open the door to a broad new range of section 1983 suits. The court said the plaintiff couldn't sue for "selective prosecution". However, the plain-

tiff can recover if he can show that the unequal treatment was "the result solely of a vindictive campaign by the mayor".

'OUGHT TO HAVE A REMEDY'

"If the power of government is brought to bear on a harmless individual merely because a powerful **state** or local official harbors a malignant animosity toward him, the individual, ought to have a remedy in federal court" the court said".

"[N]either in terms nor in interpretation is the [Equal Protection] clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives".

Therefore "A class of one (shouldn't) be denied the protection of the equal protection clause," and the plaintiff can recover if, [T]he action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective".

The courts ruling would be helpful where the plaintiff couldn't show a large pattern of misconduct.

Excerpts from:
U.S. Court of Appeals, 3rd Circuit DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, #No. 93-5301 May 1, 1995.

If a zoning board's decision was "arbitrary or irrational" a land owner can sue under 42 U.S.C. Sec. 1983 says the third circuit in what is apparently the first such ruling in the country.

An arbitrary decision violates "substantive due process under the United States Constition the court held.

The decision is "a victory for property owners," says Gus Bauman, a Washington D.C. land use attorney.

However, "The potential implications for

municipalities and municipal officials are frightening," says Mark First who represented the zoning board. He notes that the plaintiff now has a federal case even though the suit involves "nothing more than a run of the mill zoning decision".

A land owner sued under Sec. 1983. A U.S. District Court granted summary judgment to the zoning board, but the third circuit reversed the decision.

A PROPERTY INTEREST

To sue for substantive due process, a plaintiff must show a deprivation of a protected property interest.

> This court says that a land owner's mere ownership of the land amounts to a property interest for due process purposes "One would be hard pressed to find a property interest more worthy of substantive due process protection than ownership", the court said
>
> "[I]n situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached ...
>
> "We do not share the dissent's legitimate concern that this standard 'will invite the landowner into any federal court to challenge even the most mundane and routine zoning decisions."
>
> The court went on to hold that there was a factual dispute in this case sufficient to get past summary judgment, even though the landowner's only evidence that the zoning board's decision was "irrational" was one member's five-minute conversation with the business owner which occurred three years earlier.

Because of the technical federal issues and questions raised within and without all the former pleadings and responses, this plaintiff appellant feels strongly that he would be remiss if he did not add to this petition and make it a part hereof, that a copy of a sur-reply that he was preparing in opposition to the defendants motion for summary judgment.

The sur-reply was not allowed to be submitted for opposition purposes, even though this plaintiff appellant requested it to be allowed to be presented and entered into the court record. The request was in writing and copies sent both to the District Court and to the defendants attorney of record (Kirschenbaum & Kirschenbaum).

Further, the letter was objecting to opposing counsel's wrongful and misleading instructions conducted during a telephone conversation informing this appellant that in essence, there is no such thing as a sur-reply; "...there is no reply to a reply ... This is not accepted in Federal Court ... it doesn't happen ... but the rules say you cannot do it ... etc., etc. A copy of the partially prepared sur-reply objecting strenuously to facts and written statements contained in the papers identified as defendants "Reply Memorandum of Law" submitted by Attorney Ira Levine.

Furthermore, this appellant requested an opportunity for oral argument against or to oppose the defendant's motion for summary judgment. This appellant was not afforded an opportunity to orally argue against the motion and no opportunity for a written sur-reply. Summary Judgment is not a tool to replace the 7th Amendment Constitutional right to a trial by jury. Summary judgment should not be allowed to be granted under the circumstances of this case, nor should it be granted in this case because of the numerous issues of fact and compelling federal questions to be answered.

The motion for summary judgment and the order dismissing some of the defendants-for failure to state a claim upon which relief can be

granted - appears, basically to be granted because of the plaintiff-appellant's inability and lack of expertise in expressing his grievances properly in the form of a complaint and/or conveying to or convincing the district court that these outrageous events and violations did embrace civil rights deprivation; and that they did occur, by and large through the acts, omissions, cooperation, collusion and above all; "the aggregate professional cunning" of all the named defendants, otherwise the dispossession by fraud & oppression could not have been possible during this enlightened era (1986 thru 1995).

In this case, delaying or stopping judicial intervention and denying a jury trial would subject this pro se litigant to serious irreparable harm, since it has now been just short of an entire decade that this Pro Se appellant has been deprived of the complete and unrestricted use of his lawful private property rights - and further denial would be more than irreparable - the past and future wrongful withheld RIGHTS would be lost forever. How can severed civil-rights losses be re-compensated?

This appellant goes on to object to the appellee's position that a state remedy exists for this dispute. As shown throughout this petition federal questions exist and are compelling. The final Judgment of the District Court as written and signed on April 24, 1995 is a virtual death sentence to my complaint in State Court; and in turn, circumvention of a forum to air and adjudicate my complaint will have succeeded.

Further, this appellant seeks to bring attention to parts of the proceedings at the District Court, and seeks critical scrutiny of the untimely or otherwise tardy responses of the defendants papers contained in the Docket Sheet of case CV91-4162.

Whereas it appears on the face of the docket sheet that at least some of the entries seem to be missing, specifically items: 17, 20, 22, 28, 36; and whereas appellant deems that item #36 entitled "Rule 3(g) Statement by Michael T.

Podgurski is of serious importance with regard to summary judgment.

While reviewing the Docket Sheet, this appellant has noticed that there is at least one of the plaintiff's documents entitled "Opposition of Affidavits of Co-Chairmen of the Board of First American Title Insurance Co.," that was submitted on the docket sheet.

No affidavits in support of summary judgment were signed by the defendants only attorney affidavits were provided. It is my understanding that this is not proper procedure.

This appellant has very little knowledge of the inner workings of the judicial system and is unable to determine if he has been treated fairly and that his documents have been handled properly. This appellant "Red Flags" certain areas of the pleadings because the Courts including the Court of Appeals and Supreme Court must remain as the impartial tribunal for the adjudication of disputes; and must keep tabs on the fairness of the past proceedings, especially when a novice or a pro se litigant who is easily baffled, is attempting to assert his rightful place in the course of dispute.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for the following reasons: This Petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this Court; and the Opinion below conflicts, by implication, with previous decisions of this Court and with the decision of another Circuit. The District Court citing Williamson County Regional Planning Commission v. Hamilton Bank of Johnson city. 473 U.S. 172 (1985). Revolves around legal takings through regulatory or condemnation. The case at hand revolves around land and rights larceny through fraud and illegal ruthless land grabs.

This appeal being denied by the United States Court of Appeals for the second circuit in

an order dated July 17, 1995 issued as mandate on July 18, 1995 (a copy herein contained at Appendix A) and stating "A motion having been made by petitioner prose for a preliminary injunction, upon consideration thereof, it is ordered that said motion be and hereby is denied and the appeal is dismissed as frivolous".

Plaintiff appellant raises arguments herein against the appeal being frivolous by virtue of his constitutional right to a trial by jury (as opposed to summary judgment). Dismissal of complaint which should be considered by a jury trial has been granted and guaranteed by the 7th amendment to the United States Constitution has been ignored.

This above constitutional guarantee should overwhelmingly support the petitioner's request for writ on Certiorari to review the appeal denial and of an oral argument hearing on the appeal that poses federal questions and Civil Rights violations case. Plaintiff appellant prose argues for review on Certiorari to be granted based in part on the following: as respectfully suggesting the appeal is, in fact not a frivolous appeal.

The dismissal of the appeal as frivolous by the Court of Appeals for the second circuit is in fact arbitrary, impulsive, irrational and without solid foundation, and/or without just cause. The petition comes before this court as the result of summary judgment granted in favor of motion for Defendant Suffolk County et al. dismissing a complaint containing civil rights violations.

The complaint was instituted because of a ruthless land grab conspiracy perpetrated by the defendants with the aid of doctored up documents to assist an on going fraud to deprive this appellant of land and property rights without just compensation, without substantive due process/procedural due process without equal protection under the law. All of which are violations of "Bill of Rights Amendments fifth, seventh, ninth, fourteenth.

The complaint describing the series of

events leading to the uncompensated taking and deprivation of private property rights dismissed by summary judgment should not take the place of a trial that is guaranteed by the 7th Amendment to the U.S. Constitution. This case is about substantive due process; the violation of appellants' constitutional guarantees by the defendants which are and should be redressable under the United States code 42 U.S.C. 1983, 1985, 1986 as well as equal protection under the law.

Many federal jurisdictional avenues have been exposed before and during pleadings as is cited in the briefs and reply briefs being made a part of this case and requested to be reviewed upon this writ of Certiorari.

And many federal questions have been raised as described in the papers. Federal questions have been raised as described in the papers. Federal questions must be adjudicated in federal court when a subdivision of the state or municipality is involved in controversy.

If this court allows dismissal of this appeal to stand upon statement of being frivolous; it would be tantamount to granting a license to state and state municipal subdivisions to wrongfully confiscate by the wholesale taking, of the entire private land holdings owned in the United States without just compensation. They, the state government then could not be curtailed by virtue of the constitution.

Summary judgment and "dismissal of appeals as frivolous" would prevail as the supreme law of the land. And in turn the demise of Constitutional safeguards would render private citizens as sitting ducks to whim and fancy of local government desirous of choice parcels of private land and/or the covenants or rights that run with the land as a matter of law.

This appeal is not frivolous, it strikes at the basic right of common citizens to have a remedy for redress and thus I appeal to Supreme Court of the United States to grant my petition for writ of Certiorari. This is usually done if the decision in the case is likely to affect

issues in many other cases, especially when an important question of constitutionality or jurisdiction or when the right to appeal is involved.

The "United States Constitution" and the "Bill or Rights" and the congressionally enacted U.S. Code 42 sections 1983, 1985, and 1986 are the very root or essence of this petition and certainly are not to be considered frivolous. They are the foundation and fundamental building blocks of our nation.

CONCLUSION

For the reasons set forth above and for the relief requested below a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals in this matter.

1. That this Court over rule and terminate the Judgment granting Dissmissal of the Complaint.

2. That the Federal Court retain jurisdiction of this case.

3. That this Court compell First American Title Insurance co. to provide counsel, defense, indemnity, etc. persuant to Federal Case Allstate v. Vavasour 797 Fed Supp. 785, since they were paid for title insurance and they must now stand in my shoes.

4. That this Court not allow the order and memorandum dated April 24, 1995 which tends to dilute the seriousness of this civil rights case, to stand.

5. That this court remand this case with all of its defendants back to the district court for trial.

6. That this Court overule the order dated May 1, 1992 which had the effect of dismissing some of the defendants for failure to state a claim to which relief could be granted.

7. That this Court find in favor of this appellant, all the relief requested contained in the prayer for relief stated in the original complaint.

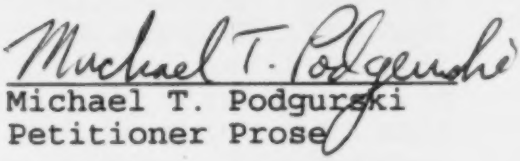
8. That this court insist that the part of this action, that has left its footprints implanted and spanning the course of three different centuries, the 18th century; the 19th century; and the 20th century -- and now in the year 1995, the dispute sits before this United States Supreme Court -- must be brought, once and for all time, to a just and lasting conclusion, so that the grief it has caused in the past will never darken another plaintiff's time on this earth again.

9. And the injunctive relief sought at the District Court which was denied, and which terminated an order to show cause why this appellant cannot use the road to the beach while the litigation is pending. (Persuant to Faulkner v. Jones (South Carolina Citidel) Federal Reporter 10 F. 3d 226.) Request for injunctive relief filed March 24, 1995.

10. All defendants be remanded back to the district court for trial as the 7th amendment to the U.S. Constitution provides. Summary judgment should be overturned. 42 U.S.C. 1983 etc. need not be exhausted through state remedies.

Dated: Nov. 15, 1995

Respectfully submitted,



Michael T. Podgurski
Petitioner Prose

[1]If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions regarding various decisions on proper use of Summary Judgment, contained elsewhere in this document.

United States Court of Appeals
for the Second Circuit

E.D.N.Y. (bkny)
91-CV-4162

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and ninety five.

Michael T. Podgurski,

Plaintiff-Appellant

vs.

Suffolk County, et al

Defendants-Appellees

A motion having been made herein by petitioner pro se for a preliminary injunction, upon consideration thereof, it is ordered that said motion be and hereby is denied and the appeal is dismissed as frivolous.

S/

S/

S/
Circuit Judges

RKW, JDM, JMW
Filed July 17, 1995

Appendix A

April 24, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---x

MICHAEL T. PODGURSKI,

Plaintiff,

- against -

JUDGMENT
91-CV-4162 (DGT)

THE COUNTY OF SUFFOLK, et al.,
Defendants.

---x

An order of Honorable David G. Trager, United States District Judge, having been filed on March 31, 1995, granting defendants' motion for summary judgment and dismissing the complaint, it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; that defendants' motion for summary judgment is granted; and, that the complaint is dismissed.

Dated: Brooklyn, New York
April 24, 1995

ROBERT C. HEINEMANN
Clerk of Court

By: S/
James Giokas
Chief Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL T. PODGURSKI,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK, et al,

Defendants.

MEMORANDUM AND ORDER

CIVIL ACTION
CV -91-4162

TRAGER, District Judge:

Suffolk County and its officials which have been sued in this case have moved for summary judgment. For the reasons set forth below, the court grants this motion and dismisses the complaint.

This case concerns a dispute as to the proper site of the boundary line between plaintiff Michael Podgurski's oceanfront property in Long Island, and an adjacent piece of property which Suffolk County owns. Plaintiff has claimed that his research into historical records has shown that not only has the boundary line been misplaced, but that easements on Suffolk County's property have been granted in his favor. Suffolk County purchased this property in 1986 from the Girl Scouts, which had run a facility there called Camp Barstow.[1]

---

1. The Girl Scouts were named as defendants in this suit, but they were previously dismissed by Judge Sterling Johnson, Jr. by an order signed on May 1, 1992. Plaintiff had also sued First American Title Insurance Co., his title insurance company, for its failure to have defended and/or indemnified him based on the claims which he has raised in this lawsuit. In the same order, Judge Johnson also dismissed First American from this case.

Plaintiff has alleged federal jurisdiction based on 42 U.S.C. 1983, and has contended that the defendants have engaged in a conspiracy to have him dispossessed of his property rights, as they have not concurred with plaintiff as to the merits of his research, nor have they permitted him to exercise the property rights which he has claimed. The proper remedy for plaintiff's boundary and easement disputes, however, lies not in federal court, but in state court. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (in takings claim, property owner must first seek redress through state remedies). New York plainly provides adequate means to resolve plaintiff's claims. See generally 90 N.Y. Jur. 2d Real Property -- Possessory and Related Actions 413 (1991).

Accordingly, the court grants the defendants' motion for summary judgment, and directs the Clerk of the Court to issue a judgment which dismisses this case.

SO ORDERED:
Dated: Brooklyn, New York
March 31, 1995

S/
HONORABLE DAVID G. TRAGER
United States District Judge

Sent To:
Michael T. Podgurski
Plaintiff pro se
107 Landing Road
Miller Place, New York 11764

Ira Levine, Esq.
Kirschenbaum & Kirschenbaum, P.C.
Attorneys for Defendants
200 Garden City Plaza
Garden City, New York 11530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL T. PODGURSKI,
Plaintiff,
v.

ORDER
91 CV 4162

THE COUNTY OF SUFFOLK, A MUNICIPAL CORPORATION: PATRICK HALPIN, SUFFOLK COUNTY EXECUTIVE: RICHARD FINN, ACTING COMMISSIONER OF SUFFOLK CO. DEPT. OF PARKS, JOHN TURNER, DIRECTOR OF NATURAL RESOURCES FOR SUFFOLK CO. PARKS, GEORGE KEIGH d/b/a LOUIS MCCLEAN ASSO., CONSULTANTS AND SURVEYORS FOR SUFFOLK COUNTY: HAROLD TRANCHEON, N.Y. LICENSED SURVEYOR: RICHARD H. O'BRIEN, PRESIDENT and CHIEF EXECUTIVE OFFICER OF FIRST AMERICAN TITLE INSURANCE CO. OF N.Y.: HAROLD S. SCHWARTZ, CHAIRMAN OF THE BOARD OF FIRST AMERICAN TITLE INSURANCE CO.: NASSAU COUNTY GIRL SCOUTS, INC., JOHN DOE and/or JANE DOE "1" thru "99", individuals who may have knowledge of; or contributory negligence to this action and are unknown to the plaintiff at this time, and TOWN OF BROOKHAVEN,

Defendants.

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL T. PODGURSKI
107 Landing Road
Miller Place, NY 11764
Plaintiff Pro Se

FOR THE DEFENDANTS: IRA LEVINE, ESQ.
Kirschenbaum & Kirschenbaum
300 Garden City, NY 11530
Garden City, NY 11530
Attorney for Suffolk County, Halpin, Finn, Turner and Nassau County Girl Scouts

Appendix C

DOUGLAS L. PINTAURO, ESQ.
L'Abbate & Balkan
1050 Franklin Avenue
Garden City, NY 11530
Attorney for Louis K. McLean Associates,
P.C. s/h/a George Keigh d/b/a
Louis McClean

BERNADETTE HARRIGAN, ESQ.
Morris, Graham, Stephens & McMorrow
265 Post Avenue
Westbury, NY 11590
Attorney for Harold Trancheon

JOHN A. FRATES, ESQ.
JOHN T. KANIA, ESQ.
First American Title Insurance Co.
1050 Franklin Avenue
Garden City, New York 11530
Attorney for First American, Richard
O'Brien, and Harold S. Schwartz

DAVID P. FISHBEIN, ESQ.
Brookhaven Town Attorney
3233 Route 112
Medford, New York 11763
By: Philip H. Sanderman,
Deputy Town Attorney
Attorney for Town of Brookhaven

Johnson, District Judge:

For the reasons stated in the record for oral argument on March 6, 1992, the motions by George Keigh d/b/a Louis McClean Associates, Harold Trancheon, Richard O'Brien, Harold S. Schwartz, First American Title Insurance Company, Nassau County Girl Scouts, Inc. and the Town of Brookhaven to dismiss the complaint against them for failure to state a claim is hereby granted.

So Ordered.

S/
UNITED STATES DISTRICT JUDGE

DATED: Brooklyn, New York
May 1, 1992

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Sixth day of September one thousand nine hundred and ninety five.

MICHAEL T. PODGURSKI,

Plaintiff-Appellant,

Dkt. No: 95-7419
Sept. 7, 1995

v.

SUFFOLK COUNTY, Suffolk County Dept. of Law, PATRICK G. HALPIN, RICHARD FINN, JOHN TURNER, GEORGE KEIGH, HAROLD TRANCHON, JR., RICHARD H. O'BRIEN, HAROLD S. SCHWARTZ, NASSAU COUNTY GIRL SCOUTS INC. TOWN OF BROOKHAVEN DEPT. OF LAW, JOHN/JANE DOE 1-99

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Michael T. Podgurski

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By:
S/
Beth J. Meador
Administrative Attorney

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV (1868)

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPELLANT CITES FOLLOWING IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI U.S. Dist. Col. 1962. On summary judgment, record will be viewed in light most favorable to party opposing the motion. Fed. Rules Civ. Proc. rule 56(c) 28 U.S.C.A. Poller v. Columbia Broadcasting System, Inc., 82 S.Ct. 486, 368 U.S. 464, 7 L.Ed. 2d 458.

U.S. Dist. Col. 1986. Non-moving part need not produce evidence in a form that would be admissable at trial in order to avoid summary judgment. Fed. Rules Civ. Proc. rule 56(e), 28 U.S.C.A. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 477 U.S. 317, 91 L.Ed. 2d 265.

U.S. Dist. Col. 1986. At summary judgment stage, judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Fed. Rules Civ. Proc. rule 56(c) 28 U.S.C.A. - Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 477 U.S. 242, 91 L.Ed. 2d 202.

U.S. Dist Col. 1986. Trial court should not act other than with caution in granting summary judgment where there is reason to believe that the better course would be to proceed to a full trial. Fed. Rules Civ. Proc. rule 56(c), U.S.C.A. - Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505, 477 U.S. 242, 91 L.Ed. 2d 202.

U.S. Dist. Col. 1986. Substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment factual disputes that are irrelevant or unnecessary will not be counted. Fed. rules Civ. Proc. rule 56(c), 28 U.S.C.A. - Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505, 477 U.S. 232, 91 L.Ed. 2d 202. Materiality determination on motion for Summary judgment rests on the substantive law and it is the

substantive law's identification of which facts are critical and which facts are irrelevant that governs. Fed. Rules Civ. Proc. 56(c), 28 U.S.C.A.-Id.

Summary Judgment will not lie if the dispute about a fact is "genuine" i.e., if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. - Id.

U.S. Dist. Col. 1986. Party seeking summary judgment always bear the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. Fed. rules Civ. Proc. rule 56(c), 28 U.S.C.A.- Celotex v. Catrett 106 S. Ct. 2548, 477 U.S. 317, 91 L.Ed. 2d 265.

U.S. Dist Col. 1990. When ruling on summary judgment motion, district court must resolve any factual issues of controversy in favor of nonmovant only in the sense that, where facts specifically averred by nonmovant contradict facts specifically averred by movant, motion must be denied. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A. - Lugan v. National Wildlife Federation, 110 S. Ct. 3177, 497 U.S. 871, 111 L. Ed. 2d 695.

U.S. Minn. 1992. At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing; in response to summary judgment motion, plaintiff can no longer rest on mere allegations but must set forth by affidavit or other evidence the specific facts which will be taken as true for purposes of summary judgment; at the final stage, those facts, if controverted, must be supported adequately by the evidence adduced at trial. Fed Rules Civ. Proc. Rule 56(e), 28 U.S.C.A. Lujan v. Defenders of Wildlife, 112 S.

Ct. 2130, 119 L.Ed. 2d 351.

U.S. N.Y 1960. Summary trial of controversies over property and property rights is the exception in administering justice. New Hampshire Fire Ins. Co. v. Scanlon, 80 S. Ct. 843, 362 U.S., 404, L. Ed. 2d 826.

U.S. District Col. 1962. Summary judgment is authorized only where moving party is entitled to a judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial; purpose of the rule is not to cut litigants off from their right of trial by jury if they have issues to try. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A. Poller v. Columbia Broadcasting System Inc., 82 S. Ct. 486, 368 U.S. 464, 7 L.Ed. 2d 458.

U.S. La. 1944. Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and no genuine issue remains for trial. Fed. Rules Civ. Proc., rule 56, 28 U.S.C.A. following section 723c. Sartor v. Arkansas Natural Gas Corp., 64 S. Ct. 724, 321 U.S. 620, 88 L. Ed. 967, rehearing denied 64 S. Ct. 941, 322 U.S. 767, 88 L. Ed. 1593.

U.S. Dist Col. 1949. Summary judgment may be given under Federal Rules of Civil Procedure only if there is no dispute as to any Material fact. Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A. Fountain v. Filson, 69 S. Ct. 754, 336 U.S. 681, 93 L. Rd. 971.

U.S. Okl. 1963. Summary judgment was not warranted in view of conflicting facts presented by affidavits and depositions to District Fed. Rules. Civ Proc. Rule 56, 28 U.S.C.A. Simler v. Conner 83 S. Ct. 609, 372 U.S. 221, 9 L. Ed. 2d

691.

U.S.N.Y. 1968. Issue of material fact required by summary judgment rule to present to entitle party to proceed to trial is not required to be resolved conclusively in favor of party asserting its existence; rather, all that is required is that sufficient evidence supporting claimed factual dispute be shown to require jury or judge to resolve parties differing versions of truth at trial. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A. First Nat. Bank of Ariz. v. Cities Service Co., 88 S. Ct. 1575, 391 U.S. 253, 20 L. Ed. 2d 569.

Section 42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. SS 1979; Pub.L. 96-170, SS 1, Dec. 29, 1979, 93 Stat. 1284.)

42 U.S.C. 1985. Conspiracy to Interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen, who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in

this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have any action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. SS 1980).

Section 42 U.S.C. 1986. Action for neglect to prevent

Every person who have knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Supreme Court, U.S.
FILED
DEC 4 1995
OFFICE OF THE CLERK

(2)

No. 95-784

IN THE

Supreme Court of the United States

October Term, 1995

MICHAEL T. PODGURSKI,

Petitioner Pro Se,

vs.

SUFFOLK COUNTY, SUFFOLK COUNTY DEPT. OF LAW, PATRICK G. HALPIN, RICHARD FINN, JOHN TURNER, GEORGE KEIGH, HAROLD TRANCHON, JR., RICHARD H. O'BRIEN, HAROLD S. SCHWARTZ, NASSAU COUNTY GIRL SCOUTS INC., TOWN OF BROOKHAVEN DEPT. OF LAW, JOHN/JANE DOE 1-99,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS SUFFOLK COUNTY, HALPIN, FINN, TURNER AND THE NASSAU COUNTY GIRL SCOUTS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	3
ORDERS OF THE COURTS BELOW	4
ARGUMENT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Baker v. McCollan, 443 U.S. 137 (1979) ... 8

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 8

Gigliotti v. Redevelopment Authority of New Cassel, 362 F. Supp. 764 (W.D.Pa. 1983), affirmed without opinion 492 F.2d 1238 (3rd Cir. 1983) 7

Graham v. Connor, 490 U.S. 386 (1989) 8

Monroe v. Pape, 365 U.S. 167 (1961) 8

People of The State of New York v. Witherspoon, 52 Misc. 2d 320, 275 N.Y.S. 2d 592 (Dist. Ct. Suffolk Co. 1966) 9

United States Constitution

Fifth Amendment 4

Fourteenth Amendment 4

Statute

42 U.S.C. §1983 1,8

Rules of The Supreme Court of The United States

Rule 10.1 6

Rule 14.5 6

Rule 42.2 5

QUESTIONS PRESENTED

Whether 42 U.S.C. §1983 provides a basis for federal jurisdiction over a boundary and easement dispute between the owners of adjacent parcels of real property.

The United States District Court dismissed petitioner's complaint and ruled that the proper forum for such a dispute is state court.

Whether the United States Court of Appeals for the Second Circuit correctly dismissed petitioner's appeal of the decision dismissing his complaint.

The appeals court ruled that the appeal was frivolous.

PRELIMINARY STATEMENT

This case involves an ordinary boundary dispute between two adjacent landowners. Petitioner claims that his title extends fifty feet onto land owned by the County of Suffolk. Petitioner also claims a right of way over a portion of the property.

Petitioner is a pro se litigant who has been persistent in his attempts to maintain an action in federal court, although his appeal from the order of the United States District Court for the Southern District of New York dismissing his action was characterized as "frivolous" by the United States Court of Appeals for the Second Circuit. Undeterred by the District Court's and Second Circuit's rulings, petitioner seeks a writ of certiorari. There is no basis for federal court jurisdiction of petitioner's claims, and as with petitioner's prior appeal, his petition for a writ of certiorari is frivolous.

STATEMENT OF FACTS

By deed dated December 30, 1986, the Girl Scouts of Nassau County, Inc. conveyed title to a parcel of property known as Camp Barstow to Suffolk County. Petitioner is an owner of a parcel adjacent to Camp Barstow. He acquired title to his parcel of property by deed dated December 29, 1980. Petitioner asserts that he is the owner of approximately fifty feet of land on his easterly boundary which is part of Camp Barstow, and he claims that there exists a right-of-way.

With respect to its rights concerning the property in issue, Suffolk County has acted as any private property owner. Suffolk County has not acted under color of law. Thus, the issue is whether a real property dispute provides a basis for federal jurisdiction under 42 U.S.C. §1983 as a result of one of the property owners being a local government. We submit that a local government which asserts property rights in a manner no

different from that of any private person cannot be held liable under 42 U.S.C. §1983. Nor can such a local government be found to have violated the Fifth and Fourteenth Amendments to the Constitution based on its assertion of ownership rights to real property.

ORDERS OF THE COURTS BELOW

By order dated May 1, 1992, United States District Court Judge Sterling Johnson dismissed petitioner's complaint as against all defendants except Suffolk County and its officials, defendants Halpin, Finn and Turner. A copy of Judge Johnson's order is annexed as Appendix C to the petition for a writ of certiorari.

By memorandum and order dated March 31, 1995, United States District Court Judge David Trager dismissed petitioner's complaint as against the remaining defendants. A copy of Judge Trager's memorandum and order is annexed

as Appendix B to the petition for a writ of certiorari. A copy of the judgment entered based on Judge Trager's memorandum and order is included in Appendix B to the petition for a writ of certiorari. Petitioner's appeal to the United States District Court for the Second Circuit was dismissed as frivolous, by order dated July 17, 1995, a copy of which is annexed as Appendix A to the petition for a writ of certiorari. Petitioner's petition for rehearing and suggestion that the action be reheard in banc was denied by order dated September 7, 1995. On November 20, 1995, petitioner filed his petition for a writ of certiorari.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner's pro se petition is, in general, incomprehensible, containing numerous irrational claims and complaints which fail to

demonstrate any basis of special and important reasons to grant the petition. The courts below have ruled correctly and consistently in this case. Although petitioner has had available to him adequate state remedies, petitioner has chosen to engage in lengthy and vexatious litigation in the federal courts. Petitioner should be sanctioned in order to deter him from engaging in further harassment of these defendants, and respondents request that damages and costs be awarded against petitioner, pursuant to Rule 42.2 of the Rules of the Supreme Court of the United States, on the grounds that the petition is frivolous. Respondents have been required to defend against petitioner's frivolous claims for several years, incurring substantial expenses in excess of $25,000.00.

There is no basis for granting the petition for a writ of certiorari. The Second Circuit has not rendered a decision in conflict with another United States Court of

Appeals, has not decided a federal question so as to create a conflict with a state court of last resort, and has not departed from the accepted and usual course of judicial proceedings. Rules of The Supreme Court of The United States, Rule 10.1. Additionally, petitioner's failure to clearly present the essential information necessary for an adequate understanding of this matter is sufficient reason for denying the petition. Rules of The Supreme Court of The United States, Rule 14.5. The fact that there has been a prior ruling that petitioner's appeal to the Second Circuit was frivolous highlights the lack of merit in the petition for a writ of certiorari.

In analogous cases involving condemnation proceedings, a difference of opinion between the condemnor and the land owner, with respect to the value of the property sought to be acquired, has not been found to be a taking without due process and just compensation.

Gigliotti v. Redevelopment Authority of New Cassel, 362 F. Supp. 764 (W.D. Pa. 1983), affirmed without opinion, 492 F.2d 1238 (3rd Cir. 1983).

No employee of Suffolk County acted under color of any statute, ordinance, regulation, custom or usage as that phrase has been interpreted by the courts. Suffolk County has been exercising its rights as a property owner and has, in the exercise of its property rights, always acted in good faith. *See Schroder v. Volker*, 864 F.2d 97 (10th Cir. 1988). The purpose of 42 U.S.C. §1983 is to give a person, who under color of state law is deprived of rights, privileges or immunities secured by the Constitution, adequate remedy where the state remedy though adequate in theory is not available in practice. *Monroe v. Pape*, 365 U.S. 167 (1961).

§1983 is not itself a source of substantive rights, but provides remedies to vindicate federal rights elsewhere conferred.

Baker v. McCollan, 443 U.S. 137 (1979); *Graham v. Conner*, 490 U.S. 386 (1989). In order to state a cognizable claim under §1983, the pleading must identify the federally protected right. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Petitioner has no Federally protected right because Suffolk County is not seeking to confiscate his real property without just compensation. Suffolk County's position is that petitioner is not the owner of the disputed portion of real property, nor does he have a right to use the so-called right-of-way. Such a grievance as petitioner asserts is appropriately heard in state court. Suffolk County is an adjacent landowner seeking to enforce rights acquired in a proprietary capacity as opposed to a governmental capacity. *See United States v. Certain Parcels of Land in Los Angeles County*, 63 F. Supp. 175 (S.D. Cal 1945); *People of The State of New York v. Witherspoon*, 52 Misc. 2d 320, 275 N.Y.S.2d 592 (Dist. Ct. Suffolk Co.

1966).

CONCLUSION

The petition for a writ of certiorari should be denied and appropriate sanctions should be imposed.

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